IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 106 OF 1994

The State of Maharashtra.] .. Appellant

Vs

(.1) Shivdas Nana Bhagat,]
(.2) Bhalchandra Vasant Keni,]
(.3) Vishwas Baliram Kavale,]
(.4) Raja Namdeo Nikam,]
(.5) Ravindra Uttam Khandagale,]
(.6) Anant Bhiva Govilkar,]
(.7) Subhash Dagadu Shinde,]
(.8) Arban Dharma Bhoir,]
(.9)Bankelal Surajprasad Chourasiya(dead)]
(10) Sunil Pandurang Satpute,]
(11) Manohar Sitaram Mhatre,]
(12) Rajan Narayan Kine.]..Respondents

Shri P.M. Vyas, Spl.P.P. with Shri A.M. Shringarpure, A.P.P., for the appellant- State.

Shri P.M. Pradhan, Advocate for the respondent Nos.1 to 11. (Respondent No.9 dead).

Respondent No.12 served - absent.

CORAM: S.S. PARKAR &
ANOOP V. MOHTA, JJ.

DATED: 04TH MARCH, 2005

ORAL JUDGMENT : [Per Anoop V. Mohta, J.]

1. This is a State Appeal against the order of acquittal dated 11th November, 1998, passed by IInd Additional Sessions Judge, Thane, whereby all the respondents - original accused Nos.1 to 13 have been

acquitted of the offence punishable under Sections 34, 120B, 147, 148, 149, 307, 302 of the Indian Penal Code (for short "IPC") and also of the offence punishable under Sections 27, 25(c) read with Section 7 of the Arms Act.

2. Atmaram Shripat Patil (the deceased) was running a business of excavation and sale of sand from Mumbra creek and had 27 labourers under him. Ramdas Shirole (PW1) was the Supervisor of this work. A plot No.1 at Retibunder, to construct a fishing pond, was allotted to him. Kathod Devu Bhagat (PW10) was working as a Commission Agent of the deceased. Accused No.12 also runs a similar business in another plot in the same vicinity. It is alleged that about two months prior to the incident, Kathod Devu Bhagat along with his associates assaulted accused/respondent No.1 with a sword and he was arrested. For the release on bail, the deceased helped him financially also.

3. On the evening of 5th March 1991, the work of tilting of fishing pond was going on under the supervision of Ramdas Shirole. The other workers Namdeo Borse, Rohidas and some others were also working. The deceased Patil and his son Vilas (the deceased) were giving instructions to the workers. At about 6.45 p.m.

when Kathod went to ask them for transportation of some sand, 7/8 persons carrying guns and revolvers arrived and stood near the compound wall besides Bombay-Poona Road and started firing towards the deceased. Atmaram and Vilas (the deceased) were shot down. The workers including Ramdas Shirole and Namdeo Borse (PW2) witnessed the 7/8 persons firing. They managed to hide themselves in the surrounding shrubs. On seeing this firing, Kathod started running. He was chased by two of the assailants and fired at him. However, he succeeded in reaching the office of Atmaram Patil located in plot No.1 and collapsed there. After the incident, all the assailants ran away towards Mumbra in a green Matador.

4. Ramdas Shirole and Namdeo Borse came out to the spot from the shrub. Ramdas managed to bring a jeep and with the help of other workers Namdeo Borse and Tambi Changiram, put the deceased (Atmaram and his son Vilas) in the jeep and took them to the hospital of Dr. Bhanusali at Thane. Kathod was taken to Civil Hospital, Thane. Ramdas Shirole, a complainant, reported the matter at Thane Town Police Station and C.R. No.I-O/91 came to be registered there and was ultimately sent to Mumbra Police Station. Senior Inspector Marathe of Mumbra Police Station started investigation. During the investigation, he recorded the statements of various

witnesses and made recoveries of the weapons used for the crime. As Kathod was unconscious, his statement could not be recorded till 17th March 1991. A further statement of Kathod was recorded on 28th September 1991. Under the directions of the Hon'ble High Court, for further investigation, accused Nos.12 and 13 came to be arrested. The charge-sheet against accused Nos.1 to 11 was submitted on 4th June, 1991, and a supplementary charge-sheet was filed against accused Nos.12 and 13. Accordingly, both the cases were clubbed and tried together.

5. The prosecution examined 23 witnesses and the defence examined only one witness. The evidence of the prosecution can be classified into six categories viz. (A) Alleged eye witnesses: PW1 Ramdas Shivram Shirole, PW2 Namdeo Yeshwant Borse and PW10 Kathod Devu Bhagat; (B) To prove conspiracy: PW3 Chandanlal Baburao Gosavi, PW4 Rama Punja Dagle, PW5 Bhairu Punja Dagle (all these witnesses turned hostile), and PW6 Datta Jagannath Govilkar; (C) Witnesses to the Panchanama: PW7 Bhagwan Mahadeo Patil, PW8 Manish Chintaman Tare, PW9 Laxman Sopan Jagtap; (D) Medical Evidence: PW11 Dr. Shrikrishna Sitaram Dhone, PW12 Dr. Mohan Vasant Sohoni, PW13 Dr. Vishwas Murlidhar Sapatnekar, PW14 Uday Shrirang Shelke and PW15 Ramdas Kavne Sidhu; (E)

Expert Witness: Ballastic Expert PW23 Madhukar Damodar Ajgekar, Deputy Director, Ballastic Division, Forensic Science Laboratory; (F) Investigating Officers: PW16 Hafizgulam Nabi Shaikh (PSI Thane Town Police Station), PW17 Ramchandra Baburao Gavade (PSI Mumbra Police Station), PW18 Jairam Madhu Chavandke (PSI attached to Mumbra Police Station), PW19 Narayan Tukaram Kapse (PSI, Mumbra Police Station - From 13/3/1991 to 16/3/1991), PW20 Sadashiv Ravji Ghadge (PSO, Mumbra Police on 5/3/1991), PW21 Vishwas Jaitram Marathe (Main Investigation Officer), PW22 Arun Sadashiv Shingre (PI attached to Crime Branch). The sole defence witness was DW1 Vishwanath Anantrao Bhongale.

6. The learned 2nd Additional Sessions Judge, Thane, before whom the trial was conducted came to the conclusion that the prosecution failed to prove the charges against the accused beyond reasonable doubt and therefore, acquitted all the accused of all the charges levelled against them by the impugned judgment and order dated 11th November, 1993. Therefore, this Appeal against the order of acquittal.

7. We have heard learned Special Public Prosecutor Shri P.M. Vyas for the State and learned Advocate Shri P.M. Pradhan for the respondent Nos.1 to

11. None appeared for respondent No.12, though served. The Special Public Prosecutor contended that the impugned judgment and order of granting benefit of doubt to the respondents-accused is baseless, illegal and contrary to the record. The learned Judge failed to consider the recovery of tempo and the weapons in the proper prospective of the law and fact [PW11 and PW17]. Though witnesses [PW5, 6 and 8] turned hostile, their balanced testimony could not be overlooked. The charge of conspiracy against the accused was proved by PW1, 2 and 10. The learned Judge was wrong in overlooking and discarding the evidence of PW8 Manish a Panch witness [Exhibit-70] and one who shifted PW10 Kathod from the Civil Hospital, Thane to Dr. Sapatnekar's (PW13) Hospital, solely because Manish denied his signature and the fact of shifting Kathod from the Civil Hospital to Dr. Sapatnekar's Hospital. Non examination of some witnesses by the prosecution could not be the ground to discard the existing and duly proved prosecution case. The accused could not be acquitted merely because no identification parade was held in the present case. Some flaws and lacunas in the investigation should not have resulted into acquittal. The evidence of PW1 and PW2 in respect of the Panchanama about the colour of the clothes of the accused could not have been discarded. The learned Judge was wrong in observing that all the

three victims Atmaram, Vilas and injured Kathod (PW10) were not shifted to the Hospital in the same jeep and, therefore, wrongly granted benefit of doubt. The prosecution proved the motive of the accused to kill the deceased and Kathod (PW10). The learned Judge has wrongly disbelieved the main witnesses PW1, PW2 and especially PW10 merely because their statement was recorded after 12 days of the incident and as Dr. Sapatnekar and Dr. Dhone have stated and supported on record, that Kathod was in a conscious condition. The learned Special Public Prosecutor further contended that the victim or the injured must be in a position to depose. Therefore, merely because he was in a conscious condition, that itself was not sufficient. The consciousness must be full and or patience must be of sound mind. Thus, the prosecution has properly explained the reason for being unable to record the statement of Kathod for more than 12 days, as he was not in a proper condition to make the statements. Therefore, recorded statement of PW10 cannot be discarded on the ground of delay, especially when his deposition in the Court is in corroboration with the earlier statement. The finding that the attack on Kathod and the resultant injury was doubtful is also baseless in view of the evidence of PW2 Namdeo. The evidence of PW2 was overlooked. The evidence of PW10

was also wrongly disbelieved on the foundation of exaggeration and/or omission and/or contradiction. He, therefore, contended that the testimony of PW1, 2 and 10, which corroborates the other evidence, including the documentary evidence, is sufficient to convict the accused and, therefore, the impugned judgment is liable to be quashed and set aside. The learned Special Public Prosecutor relied on 1963, MLJ, 134 [Bhagwanbhai Dulabhai Jadhav Vs. State of Maharashtra] in support of his contention that existing discrepancies without any attempt at evaluation of the inherent quality of the evidence on the record is unwarranted. He further relied on **AIR 1967, S.C., 450** [Srichand K. Khetwani Vs. State of Maharashtra] and contended that Section 114 Illus.(g) of the Evidence Act cannot be invoked in the present case. The adverse inference cannot be drawn, unless a case is made out that such evidence was deliberately withheld. He further relied on **1997 (1), M.L.J., 337** [Sham @ Raju R. Anpur & Ors. State of Maharashtra] to support his submission that the testimony of a single injured witness (PW10) in a murder case, as a whole, has a ring of truth and, therefore, little discrepancy cannot make his testimony unacceptable. He also relied upon the Ballastic Expert opinion.

8. The learned Advocate appearing for the appellant, however, resisted all the above contentions and made his submission in support of the impugned judgment and order. He relied on the definition of the word "analgesics" as explained in Pharmacology and Pharmacotherapeutics authored by R.S. Satoskar, S.D. Bhandarkar and S.S. Ainapure (Revised Fourteenth Edition). The term is as under:

> **"Analgesics** are drugs which relieve pain without causing loss of consciousness."

He also relied on the Pocket Medical Dictionary authored by L.M. Harrison for the words "sedation and sedative", which is reproduced as under:

> **"Sedation** n. the production of a restful state of mind, particularly by the use of drugs [see sedative].
>
> **Sedative** n. a drug that has a calming effect, relieving anxiety and tension. Sedatives are administered at lower doses than those needed for sleep (drowsiness is a common side-effect). They have largely been replaced by tranquilizers, which are less likely to

cause drowsiness or dependence."

9. There is no dispute that the deceased Atmaram Patil and his son Vilas died on 5th February, 1991, at about 6.45 p.m., due to the gunshot injuries. They collapsed on the spot. These two dead bodies were put into a jeep by PW1 Ramdas Shirole and were taken to the hospital of Dr. Bhanushali at Thane. PW12 Dr. Sohoni examined both the dead bodies issued and the Death Certificates. The dead bodies were thereafter sent to the Civil Hospital, Thane, for post mortem. PW11 Dr. Shrikrishna, a Medical Officer in the Hospital performed the autopsy and found various bullet injuries. As per the Post Mortem Report (Exhibit-85) and as observed in paragraph 16 of the impugned judgment, there is no doubt that the death was homicidal.

10. PW10, Kathod, had sustained bullet injuries on the very day in the same incident. He was brought to the Hospital by Babu Shankar Gavli. The Examination Report, as well as, paragraph 17 of the impugned judgment described the nature of the injuries. The injuries had wound of entry and wound of exit. The injury Nos.2 to 6, as reported, might have been because of pellets of the bullet. The X-ray was taken and Kathod was advised to take rest. As per Dr. Dhone

(PW11) and, the Medical Report (Exhibit-83) PW10 Kathod was conscious. There is not much dispute about the injuries caused by firearms to Kathod. However, Kathod, against the Medical advise, left the hospital along with one Mr. Manish Chintaman Tare (PW8). He was thereafter admitted to the hospital of Dr. Sapatnekar. As per the prosecution case, and as submitted by the Special Public Prosecutor appearing for the State, Kathod was unconscious throughout after the incident and, therefore, his statement could not be recorded. He regained consciousness on 17th March, 1991, and gave a statement naming all the assailants who, according to the prosecution, actually assaulted him and the deceased with firearms. At the hospital of Dr.Sapatnekar (PW13), a bullet was removed from the body of Mr.Kathod.

11. PW1, PW2 and PW10 were the alleged eye witnesses of the prosecution. PW1 Ramdas was working with the deceased. The complaint (Exhibit-58) was lodged on 5/2/1991. This witness, according to the prosecution, was a material witness and narrated honestly, without exaggerating anything. This witness, immediately after the incident, lifted both the dead bodies with the help of PW2 and took them to Bhanushali Hospital at Thane. He had witnessed 7/8 persons standing besides Bombay-Pune Road near a wall, holding

guns and pistols. He also saw that Atmaram and Vilas had sustained gunshot injuries and to save himself, he rushed to the bushes. After two-three minutes, he came back to the spot. By that time, the other labourers, who were working, had ran away from the place. Ramdas (PW1) thereafter immediately brought a jeep, put the bodies of the deceased in the jeep and went to Dr. Bhanushali's Hospital at Thane. This witness named Namdeo Kamble, who helped him to carry the dead bodies to Bhanushali Hospital. On coming out of the said Hospital, he was informed that Kathod (PW10) had also sustained gunshot injury and, therefore, was admitted to the Civil Hospital, Thane. The complaint was lodged by this witness in the Thane Police Station. According to the prosecution, the deceased Atmaram and his son Vilas had financially helped injured Kathod (PW10) in other Court cases, when he was arrested for assaulting accused No.1 Shivdas and accused No.11. Therefore, the said accused killed the deceased. We have noted that this witness nowhere named any of the accused in the complaint. Only a doubt was raised about accused Nos.1 and 11. He had made reference to the fact of 7/8 persons firing from the Bombay-Pune Road near a wall at 6.45 p.m. and they were on the spot only for two to three minutes. Therefore, this witness nowhere supports the prosecution case that all the accused were the

assailants and that all of them were holding guns and pistols. There is nothing on the record to show that this witness has made reference of any other accused to anybody, even after lodging the complaint. The complaint was lodged with the Police on the same day, but no one was named. There was no reason for this witness, not to name all or any of the assailants if they were present at the relevant time. This witness has admitted that to save himself, he rushed to the bushes and came out only when the firing was over and saw that Atmaram and Vilas were lying injured. This witness also admitted that it came to his knowledge that Atmaram and Vilas had helped Kathod for his bail when he was arrested for assaulting accused Nos.1 and 11. This witness also admitted in the cross-examination that the assailants were not known to him at the time of the incident and, therefore, he was not sure about these persons details before lodging the complaint. He admitted that it was at the time of lodging the complaint, that the names of accused No.1 Shivdas and accused No.11 Manohar were heard by him. In the complaint, he stated that the assailants of his master and his master’s son were the hirelings of accused No.1 and accused No.11. In the cross-examination, he admitted that he did not tell before the Police that he had seen a gun with any of the assailants. He could not

give description of the assailants before the Police. He further answered that he did not know whether Kathod was assaulted by somebody and that he was present at the spot of the incident. He further deposed that none of the workers, who were present there, told him about the assailants. Similarly, he had not disclosed anything about the assailants. The evidence of this witness, therefore, according to us, and as rightly observed by the learned Sessions Judge, is difficult to accept in order to connect the accused with the crime.

12. PW2, Namdev Yeshwant Borse, is another worker of the deceased, who helped PW1 to carry the dead bodies of the deceased into the jeep. Namdev has supported PW1 to the extent that after hearing the sound like bursting of crackers, he turned and saw 7/8 persons firing continuously from guns and pistols towards the deceased Atmaram and his son Vilas. Both suffered gunshots and fell down. This witness also rushed towards the bushes to save himself. The firing went on continuously for two to three minutes. This witness has deposed that in the same firing, Kathod (PW10) was also hurt. The assailants ran away from the spot in a green coloured tempo towards Mumbra. This witness supported the prosecution’s case that PW1 brought a jeep and the dead bodies were taken to the hospital. This witness deposed

that Kathod was also removed from the said place in a jeep to the hospital. Kathod was unconscious, but this witness has also nowhere supported the prosecution case when he stated *"I cannot identify those persons."* However, in the cross-examination he was able to give description of the accused for the first time and deposed that they had worn white coloured clothes and were between 20 - 25 years. Namdev (PW2) has deposed that he saw Kathod in an injured condition in the office of his master and the distance between the spot, where his master sustained gunshot injury, to that Office, was about 100-125 meters. This witness admitted that when the assailants fled away in a tempo, he was hidden in the bushes. He never told PW1 or anybody that the assailants ran towards Mumbra in a green coloured tempo. This witness was unable to assign any reason as to why the Police had not recorded that Kathod became unconscious. This witness was never called by the Police at any time to identify the assailants. This witness, therefore, was unable to link the respective roles of the accused as sought to be contended by the prosecution in the present matter. The learned Judge, therefore, rightly passed the order of acquittal by not believing these two witnesses, PW1 and PW2.

13. The testimony of PW10 Kathod, an injured

witness, along with the evidence of PW1 and PW2, has been relied by the prosecution to connect the accused with the crime and claim these witnesses to be natural eye witnesses. This injured witness had a business relation with the deceased. He used to supply cement to his customers from the business place of the deceased on the commission basis. This witness was taking all necessary and financial help from the deceased as he was involved in some criminal cases and those cases were pending at the relevant time. The suggestion was that one of the case was related to some relation of accused No.12. This witness was also arrested for assaulting accused No.1. In both these cases, the deceased helped him. Those criminal cases, as put to him, Crime No.1-352/90 and Crime No.1-21/91, were denied, even though he admitted about two pending cases against him. This witness has further denied that there was a show cause notice of externment proceeding received by him. However, he has admitted that he replied such a notice. This witness deposed that on 5th March, 1991, at about 6.30 p.m., on hearing the sound like bursting of crackers, when he turned towards that direction, he saw 7/8 persons. Those persons were accused Nos.1, 2, 3, 5, 6, 7, 8 and 12. This witness knew all the accused. This witness saw that Atmaram and Vilas were hit by the bullet and they collapsed. This witness was also hit by

the bullet on the back and the hand and he also heard the voice *"Yalahi Ghya"*. This witness has deposed that one Bhalchandra and Rajendra Keni followed him. No other witness has supported or corroborated this chasing. He went upto the Office and collapsed there and became unconscious. This witness further claimed that he was unconscious for 10-12 days. He regained consciousness in the hospital of Dr. Sapatnekar and thereafter, his statement was recorded by the Police, there he named the above accused for the first time. This witness refused that when he was in a conscious condition in the Civil Hospital, Thane, one Manish Chintaman Tare, against medical advise, took him to the hospital of Dr. Sapatnekar. There is a document of Civil Hospital, Thane, on the record wherein the said Manish Chintaman Tare had given in writing that *"at his risk he is taking this patient out of the said hospital".* He further admitted that the reference of three crimes registered against him was made in the said reply and Manish Chintaman Tare was a witness who gave evidence on behalf of this injured witness.

14. After being admitted to the Civil Hospital, Thane, Dr. Dhone (PW11) made endorsement in the case papers (Exhibit-84) that Mr. Kathod was conscious and was in a fit condition to make statement. As per PW11,

Dr. Dhone, this witness was injured by the bullet. However, inspite of the medical advise to take rest, as noted above, one Mr. Tare shifted this witness to Dr. Sapatnekar's Hospital. It is difficult to believe that without the consent of this witness, an unknown person viz. Mr. Tare, could have shifted such injured person to any other Private Hospital. There was no statement made or recorded by anybody to suggest that the accused and no one else had fired and those bullets resulted into two deaths and injury of this witness. If this witness was conscious when he was admitted to the Civil Hospital, Thane, if he knew the assailants, there was no reason for him not to disclose any name to the doctor or to any other person. He could have disclosed the name of the assailants even to the said Mr. Tare. This witness also refused, inspite of the evidence and endorsement of Dr. Yadav of Civil Hospital, Thane, that he was conscious on 5th March, 1991. He was unconscious and, therefore, the Police was unable to record his statement, the prosecution has relied on Dr. Dhone's evidence that from time to time, he was under drugs or sedatives and, therefore, he was not in a position to make any statement. The argument was that he was not in a stable state of mind to make any statement and, therefore, even though he was conscious when he was admitted in the Civil Hospital, Thane, it cannot be said

that he was conscious to make the statement. As we have noted, this witness even denied his own signatures made on the application filed in the Sessions Court for bail. He even denied the contents of the said application. The copies of this application were also sent to the Police Commissioner, Additional Police Commissioner and the Police Inspector, Mumbra Police Station.

15. As noted above, PW1 nowhere mentioned the name of the accused in the complaint. There was no identification parade held at any point of time. The statements of these witnesses were recorded and even then there was no reference made of any of these accused. Therefore, the reliance is only placed on the testimony of PW10 Kathod. The statement of Kathod was recorded after 12 days. In the statement, for the first time, he named all the accused, as referred above. PW1 Ramdas, who was an eye witness, nowhere mentioned the presence of this witness PW10 Kathod on the spot. There is uncorroborated witnesses PW2 to support the prosecution's case that this PW10 Kathod was present at the relevant time near the deceased at 6.45 p.m. The person who informed PW1/PW2 that Kathod was injured in the same incident was not examined. The driver of the jeep in which Kathod was taken to the Civil Hospital, Thane, or such any other person was not examined. PW1,

immediately after the incident, took the bodies of the deceased to the hospital in the jeep. Narayan Godse and Thambi who helped them to shift the bodies were also not examined. Kathod's statement that he was at a distance of about 15 feet from Atmaram or Vilas at the relevant time, is also not supported by any other witness, including PW1 and PW2. Those three persons from whom the complainant came to know about the injury to Kathod were not examined to link the prosecution's case and to support the testimony of all these witnesses i.e. PW1, PW2 and PW10. They were working with the deceased in the same field. No other labourers were examined to support and/or to link the accused with the crime. These witnesses, PW1 and PW2, even in the Court, have not supported the case of the prosecution that the accused were the main assailants. PW1, who had pointed out the spot to PI Marathe (PW7) who recorded the Panchanama (Exhibit-8) on 6th March, 1991, denied that he showed the place of the incident to the Police. PW1 did not know accused No.1 or accused No.12. PW1 disclosed to the Police and not to anybody else and at the time of lodging the said complaint, as recorded above, the accused were not named, except that there was an apprehension regarding accused Nos.1 and 12.

16. The reason for not calling the Mumbra Police

immediately after the incident, specially when there was an Office near the spot of the occurrence is unclear. This witness has admitted that while lodging the complaint, he told the Police that the hirelings of the accused Nos.1 and 12 are the assailants of his master and his master's son. It means, except suspicion of firing by the hirelings of accused Nos.1 and 12, there was nothing to indicate the involvement of all the accused. Therefore, even this witness was unable to identify the assailants in order to connect the accused with the trial. The evidence of this witness is not in corroboration with the other evidence. The position is undisputed that no identification parade was conducted in this matter even though the accused were arrested by PI Marathe (PW7) and the complainant was in a position to identify the assailants. In the present case, the identification parade should have been held to complete the chain of circumstances. As noted, along with PW1 Shirole, one Namdev was also present on the spot and he stated that he saw the injured Kathod. To this, PW1 has not stated anything. If Namdev had seen all the three injured, then why PW1 Shirole had shifted only the two dead bodies of the deceased in the jeep and had left behind the injured Kathod is also unclear. This raises various doubts. As noted, none of the persons, who actually removed Kathod from the spot, were examined on

behalf of the prosecution. There was nothing on the record to show as to who shifted the injured Kathod to the hospital. On the contrary, there is evidence of Dr. Dhone, who had endorsed that Kathod was conscious when he was admitted in the Civil Hospital, Thane, on 5th March, 1991. On the contrary, in the evidence of PI Marathe, it was stated that while recording the statement of this witness, he did not state about the unconsciousness of Kathod.

17. Therefore, the testimony of Kathod PW10, unless corroborated, raises various doubts. His testimony needs to be scrutinised cautiously. His conduct of flatly refusing his own signature and documents and denying pending cases itself raises various doubts about his testimony. Dr. Dhone (PW11) who was on duty on 5th March, 1991, at Civil Hospital, Thane, after examination of Kathod, six injuries were noticed. and issued the Certificate accordingly. The case papers (Exhibit-84) which are duly proved, as they were written in his own handwriting, confirmed that Kathod left the hospital against medical advise at 8.45 p.m. There is an endorsement that one Babu Shankar Gavli (not examined) brought Kathod to the hospital. Similarly, on the same paper, there is a reference dated 5th March, 1991, that one Manish Chintaman Tare removed

the patient from the hospital at his own risk. Dr. Dhone (PW11) further confirmed the writing, as well as, the endorsement that "the patient is in conscious condition". There is nothing on the record to show that Kathod was unconscious till 8.45 p.m. on that day. Dr. Dhone further stated that some relatives were also there and when Kathod was removed from the hospital, his consent was taken and accordingly, the endorsement was made on the hospital paper. This witness PW11 remained unshaken. In this background now, it is necessary to consider the evidence of Dr. Sapatnekar (PW13) at this stage itself because if Kathod was conscious for so many hours from the time of the incident and, as per Dr. Dhone, he consciously gave his willingness to be shifted to another private Hospital, there was no reason for him not to name the accused then and there only. The name of the assailants should have been disclosed to the doctor or any of the close relatives, including the said Manish Tare. As noted, the statement of Kathod was recorded after more than 12 days. Why the statement of such injured person was not recorded immediately on the same day and whether Kathod was not in a stable state of mind to make the statement is also not clear.

18. As per the prosecution, Kathod was hospitalised from 5th March, 1991 to 2nd April, 1991,

a nd he was unconscious throughout and he was under treatment of analgesic injections and antibiotics. Dr. Sapatnekar (PW13) has categorically stated in the Certificate (Exhibit-95) that he was under treatment of analgesics and antibiotics due to the severe pain because of the injury. This witness, however, has stated that when enquired from Kathod, he replied that he sustained the injury by bullet and thereafter, no further questions were put to him as there was severe pain. Thereafter, from time to time, he was under drugs/analgesics and, therefore, no Police statement of this witness could be recorded till 2nd April, 1991. This witness has deposed that at his instance, Dr. Yadav, from time to time, issued Certificates (Exhs.109) to show the unconscious condition of Kathod. Dr. Yadav, who had issued the said Certificates, was not examined. The prosecution sought to rely on the Certificates under Section 62/63 of the Evidence Act on the foundation that though the maker of that particular document was not available, as those Certificates were issued at the instance of Dr. Sapatnekar and Dr. Sapatnekar admitted the contents of the same, the documents are duly proved and hence the same can be relied upon in support of the prosecution to say that Kathod was unconscious throughout. Exhibit-95 dated 25th August, 1993, was signed by Dr. Sapatnekar. If

the patient was sedated, his statement is unreliable. Therefore, as certified, Kathod was critically ill for about 8-10 days and was under heavy antibiotics and analgesic injections. He was also operated on 5th March, 1991 and one bullet was removed from his body. The laparotomy revealed four intestinal injuries and bleeding from mesentry vessels. This patient had bullet injuries. Exhibit-96 dated 18th September, 1993, which is Dr. Sapatnekar's Medical Report shows that Kathod was admitted because of bullet injury and he was conscious and well oriented and was answering well to all the questions. This was at about 10.45 p.m. on 5th March, 1991. He was operated on 5th March, 1991, as referred above. Dr. Sapatnekar has admitted in his evidence also that Kathod was conscious and was talking. However, as his condition was bad, he did not put any more questions. Even though this witness has identified the signature of Dr. Yadav, still, those Certificates which were issued by Dr. Yadav, were on the record, subject to the objections that the author of the document was not examined and, therefore, could not be said to be a proved document. The validity and admissibility of the document, therefore, could not be considered at the time of recording of the evidence. It appears that there was no further argument raised in this regard. The learned Sessions Judge has rightly

held that as this document was not duly proved through the author, merely the evidence of Dr. Sapatnekar cannot be sufficient to prove this document and/or its contents. Merely because Dr. Sapatnekar had instructed Dr. Yadav to prepare these Certificates, their contents cannot be said to be duly proved, specially when there is no proved corroborative evidence to support the same. However, even if we take the statement of Dr. Sapatnekar, it is very clear that when Kathod was admitted to the hospital of Dr. Sapatnekar, at that time, he was conscious and was talking. The time of admission was at about 10.00 p.m. Therefore, it appears that Kathod was conscious enough to make statement or, at least, to name the accused at the relevant time. This witness admitted that he had no knowledge as to what happened to the bullet which was taken out from the body of the patient i.e. Kathod. There was no enquiry made or any Report prepared of the said bullet. The fact remained that the said bullet was not placed on the record or proved or sent for medical examination. There is no doubt that this was a medico-legal case and the bullet recovered from the body of Kathod was material evidence to link the weapon, injury and the accused with the crime.

19. The defence was raised by this witness that

the remaining record maintained in the hospital was seized by the Income-tax Department on 24th February, 1993, and, therefore, no documents could be placed on the record, including the record pertaining to Kathod. No steps were taken by the prosecution to bring all this material/record of Dr. Sapatnekar’s Hospital on the record to support their case. In the present case, in fact, the record was called for by the accused and the evidence of DW1 Vishwanath Anantrao Bhongale was recorded to whom request was made to bring the record of Dr. Sapatnekar’s Hospital from the Income-tax Department, but for want of detailed information, no such record was produced by the said witness DW1. No connecting record, maintained in the Hospital of Dr. Sapatnekar, was produced by the prosecution. Therefore, the linking and supporting evidence or material, to Exhibit-96, is also missing in this case. We have also noted that this witness has answered that Dr. Yadav’s qualification was "R.M.P." i.e. "Resident Medical Practitioner". Therefore, it is difficult to accept the evidence of this witness in absence of evidence of Dr. Yadav that Kathod was unconscious throughout, as sought to be contended by the prosecution, as well as, by Kathod himself that he was unconscious from 5th March, 1991, to 2nd April, 1991. Dr. Sapatnekar was fully conscious of the responsibility of a Medical Officer

regarding the precaution which should be taken while extracting a bullet in a medico-legal case as pointed out from the book of Medical Jurisprudence by Dr. Parekh, Pg. 301, 1991 Edition, was shown to him. The defence Advocate also relied (Pr.8) on the terms "Analgesic" & "Sedative" to support the reasoning of the learned Judge that Kathod was conscious, but deliberately delayed the statement and falsely implicated all the accused.

20. PW21, Vishwas Jaitram Marathe, the Investigating Officer has investigated this case. An application was made under Section 169 of the Criminal Procedure Code for discharge of accused No.11 Mhatre. The investigation was later on transferred to PI Shingre (PW22). This witness has deposed in the cross-examination that he had never seen the medical case papers of Kathod (Exh.84), except for the first time in the Court. He also stated that "Today, I am convinced on the case papers that when the patient Kathod was admitted in the Civil Hospital, Thane, at that time, he was conscious." He further stated that he had no reason to suspect about the endorsement on Exh.96 to the effect that "Patient, when brought, was conscious, he was well oriented, answering well to all questions. His memory was of an event of bullet

firing." He further deposed that on these two papers (Exh.84 and Exh.96) there are no contrary entries about the level of consciousness of the patient. He further deposed that "If these two entries would have been seen by me at the earliest time, then I could have been convinced that the patient Kathod was conscious and was in a condition to give statement. PSI Kapse and PSI Gavade whom I had sent to record the dying declaration of the patient, by various time did not bring to my notice this entry at any time." This witness has further deposed that "Dr. Sapatnekar never gave any Certificate in his own handwriting to the effect that the patient was not in a condition to give his statement." This witness has deposed, based on the application (Exh.17) that on 12th March, 1991, the applicant Kathod was conscious. He further deposed that "I did not ask Kathod on 12th March, 1991, that the signature on the application (Exh.117) is made by him or not. I felt that it was the signature of Kathod, therefore, I did not enquire with him." This witness, therefore, in a way, destroyed the prosecution case that Kathod was not conscious till 17th March, 1991. This witness, in fact, supports the defence case that Kathod was conscious on various occasions and at least on 5th March, 1991 and 12th March, 1991.

21. PW22, Arun Sadashiv Shingre was the second Investigating Officer as he was directed to investigate the matter as per the direction given by the High Court (Exh.130). This witness had recorded the additional statement of Kathod on 23rd September, 1991, and supplementary charge sheets against the concerned accused were filed on 8th October, 1991. We have noted from the evidence that this witness had filed an Affidavit to the Bail Application filed by the accused to oppose the bail in the High Court, as well as, in the Supreme Court. He had attended the case personally in both the Courts. This witness has further endorsed, after seeing Exh.96 in reference to the conscious condition of PW10 Kathod, that the endorsement was right. He further deposed that he could not see this paper earlier. He further deposed that "If the endorsement on Exh.96 in that respect had been seen by me at the proper time when I took over the investigation at the same time, I could have come to know what was the real state of mind of the witness Kathod". This witness has further deposed that "On perusal of this paper, prima facie, it was seen that on 12th March, 1991, Kathod was in a conscious condition." He further stated that Kathod made wrong dying declaration to the effect that he was unconscious till the recording of the dying declaration dated 17th March, 1991. This witness has

further deposed that the signature on Exh.117 is of Kathod only. We have noted that there were various incorrect statements made even in the Affidavit by this witness as recorded in paragraph 4 of the cross-examination. This witness has admitted that to file Affidavit in the Supreme Court, he went from Bombay to Delhi by aeroplane and one Gajanan Devane was with him. The said Gajanan Devane was one of the Panch of the Inquest Panchanama of the matter. This witness has stated that he went to Delhi by flight at his own cost. We have also noted that this witness has spend his own money and travelled to Delhi by Air for more than 4-5 times. It is difficult to accept the prosecution case, based on this evidence. This witness has not supported the investigation fully to bring the accused to their guilt. The testimony of this witness is quite shaky and according to us, he has not supported the prosecution case as the prosecution sought to contend.

22. The learned Sessions Judge, in this background, has rightly taken note of the evidence of Mr. Tare (PW8) who was a Panch witness and who, according to the defence, was the person who shifted Kathod from the Civil Hospital to the Hospital of Dr. Sapatnekar. This witness (PW8) was in fact a witness in the criminal case of Kathod, still he denied his

friendship with Kathod. He also denied that he, at any point of time, made an endorsement before Dr. Dhone in the Civil Hospital, Thane, and shifted Kathod from the Civil Hospital, Thane, to Dr. Sapatnekar's Hospital. The evidence on the record, including the signature of this witness Tare, as taken note of, shows that he was the same person, but for various reasons, he denied his own signature and the events. Kathod also refused flatly that he was not aware as to who had removed him from the Civil Hospital, Thane, even though he was conscious as recorded by PW11 Dr. Dhone and PW13 Dr. Sapatnekar. In a way, the evidence of Dr. Sapatnekar is corroborating with Dr. Dhone, but these two witnesses i.e. PW10 Kathod and PW8 Tare are denying the same. Therefore, it is difficult to accept the testimony of these witnesses as it raises various doubts in the prosecution case.

23. The statement of Kathod was recorded as a dying declaration by the Special Magistrate (Exhibit-80) through PSI Kapse. In this statement, PW10 has made a reference to accused Nos.1,2,3,5,6,7,8,11 and 12 for the first time after 12 days i.e. on 17/3/1991. We have noted that the doctor said that Kathod was unconscious from 5/3/1991 to 2/4/1991, whereas admittedly the statement was recorded on 17th March, 1991. Therefore,

all these inconsistencies, which go to the root of the matter, raises various doubts in the prosecution case, including the statement of Dr. Sapatnekar and Kathod. There are various infirmities found in the cross-examination, which shows that the witnesses PW1, PW2 and PW10 have a tendency of suppressing and twisting the facts. It cannot be said that the evidence of these witnesses is sufficient to link and/or pin-point the accused with the crime. We cannot overlook the fact that PW10 Kathod was not an independent witness, but he is one of the interested witnesses in the matter.

24. There is a delay of 12 days in recording the statement of the injured witness PW10 Kathod. PI Marathe (PW7) immediately after the receipt of information, went to the hospital of Dr. Bhanushali where the dead bodies of the deceased were taken. There he came to know about the injured Kathod who was admitted in the Civil Hospital, Thane. Therefore, he went to the Civil Hospital, Thane. There he came to know that the injured kathod was removed to the Hospital of Dr. Sapatnekar, but when he reached Dr. Sapatnekar’s Hospital, he was told that the victim had been taken into the Operation Theatre. Therefore, it cannot be said that there was any intended delay on the part of the prosecution to record the statement of this

witness. On the contrary, the evidence of the two doctors, as referred above, read with the evidence of Kathod (PW10) makes it clear that it was Kathod who was avoiding to give statement before the Police, even though he was in a conscious condition and sufficiently able to explain the incident which he had seen on the spot. It is quite unnatural that Kathod, who was conscious for a sufficient time before being taken to the Operation Theatre, could not name all the accused or, at least, some of the main accused before Dr. Dhone or Dr. Sapatnekar. Therefore, his silence at the crucial moment and thereafter for 12 days raises various doubts. We have also noted that the accused were arrested by the Police on suspicion and during that period and prior to their arrest, Kathod, who was in a conscious condition, for whatever may be the reason, was unable to name the accused. His statement before the Executive Magistrate in the Hospital of Dr. Sapatnekar wherein he named all the accused, appears to be an after-thought and with a basic intention to implicate the accused in the matter. We cannot overlook the commercial and personal interest of (PW10) Kathod with the deceased, apart from previous enmity and criminal record. In absence of any corroborative evidence, including the evidence of PW1 and PW2, with regard to the involvement of the accused, the sole testimony of

Kathod cannot be the basis to convict the accused. We also cannot overlook that no other workers or labourers, who were present at the relevant time, were examined. Therefore, for want of direct evidence, the circumstantial evidence in the present matter is not sufficient to reverse the finding given by the learned Sessions Judge. According to us, this witness Kathod cannot be said to be credible and he does not inspire any confidence. We are also of the view that the evidence of Kathod is untrue, not cogent and unreliable. We have already noted the conduct of this witness, including the various denials, as well as, suppressing and twisting of various facts. In this background, the reasoning and finding given by the learned Judge in respect of this witness PW10 and other related witnesses cannot be said to be perverse or beyond the record.

25. Another aspect is the various recoveries and the Panchanama in the matter. PW3 Chandanlal Gosavi, a driver, who was examined to support the recovery of the tempo in which the accused came on the spot, even though had stated before the Magistrate that the tempo was hired by accused No.1, turned hostile in the Witness Box. Therefore, this witness also was unable to complete the link of the prosecution case, specially for the reason that in paragraph 14, he admitted threat by

the Police. Merely because in this tempo, there was recovery of driving licence of accused No.6, that itself cannot be the reason to link the circumstances.

26. PW4, Rama Punja Dagle, is an another Panch witness who was declared hostile. He is the owner of the house, where the weapons viz. choppers, guns, revolvers etc., alleged to have been used by the accused, were recovered. The prosecution claimed that he was the store keeper of the weapons of accused No.1. This witness has also denied his earlier statements. This witness has, in the cross-examination, answered that "The PSI had given me threats to tell according to his say, otherwise he will involve me in the TADA case. The Police had written my alleged statements according to their own version." He further stated that "I do not know anything in respect of this matter."

27. PW5, Bhairu Punja Dagle and PW6, Datta Jagannath Govilkar, who are both tailors and who were alleged to have stitched the masks recovered from the tempo and from the house of PW4, also were declared hostile. In the result, the prosecution story about the stitching of masks as per the order of accused No.1 also goes. These witnesses, therefore, nowhere support the prosecution case about the masks. The prosecution’s

unsupported case, based on the masks and examination of these witnesses, raises various doubts in whole prosecution case.

28. PW7, Bhagwan Mahadeo Patil, is a Panch witness to the scene of offence. The Spot Panchanama was recorded on 6th March, 1991, in the morning at about 7.00 a.m. The incident, as recorded earlier, had taken place on 5th March, 1991, at about 6.45 p.m. There is nothing on record to show that the spot was protected or not.

29. PW8, Manish Chintaman Tare, is a Panch witness to the recovery of the green coloured tempo on 6th March, 1991, at about 10.00 p.m. This recovery was not at the instance of any accused. In the said tempo, revolver box for keeping gun articles, cartridges, box containing 20 live cartridges, mask and driving licence of PW6, as referred above, were found. As we have noted, this witness though was a Panch witness, gave testimony in support of Kathod about his injuries and hospitalisation in Dr. Sapatnekar’s Hospital and he flatly denied that he was the person who had shifted Kathod from Civil Hospital, Thane. However, as noted, in paragraph 16 of his cross-examination, this witness has even denied his own signature and his own

handwriting. This witness has also admitted that he was acquitted from one criminal matter.

30. PW9, Laxman Sopan Jagtap, is another Panch witness to prove the Panchanama of the recovery of weapons alleged to be concealed by accused Nos.1 and 2. As per the prosecution, this witness has proved the discovery. This witness has also referred the presence of Panch witness Namdeo who was present at Mumbra Police Station on 7th March, 1991, at 1.00 p.m., when they were preparing the Panchanama in question in the Police Station and not on the spot. The prosecution wants to prove that at the instance of accused No.2, those weapons were recovered. The weapons were attached from a jungle. This witness has admitted that they were unable to go to the spot/place from where the articles were recovered.

31. PW12, Dr. Mohan Vasant Sohoni, was present in Dr. Bhanushali’s Hospital at Thane on 5th March, 1991, when the bodies of the deceased were brought to the said hospital. The Death Certificate was issued by this witness. This witness has admitted that as soon as the patient arrived, they informed about it to the Police.

32. PW14, Uday Shrirang Shelke, is an another

Panch witness to recovery of 37 articles/weapons alleged to be at the instance of accused No.2. As per the prosecution, this witness has proved the recovery of the weapons in question. But, we have already noted that PW4 is the owner of the house in question and even though the Panchanama was drawn, the copy was not handed over to him and the said PW4 was declared hostile. Therefore, independently, this recovery of weapons raises various doubts, though it is sought to be contended that the weapons were recovered at the instance of accused No.2. This witness has deposed that the accused No.2 led them to a house and then he removed the latch of the door of that house and took them into the house and from the ground, he took out the weapons and showed the same to them. As noted, PW4 is the owner of the said house who has turned hostile. It is unbelievable that the house was just latched without any lock and the accused was able to take the Police into the house. The Panchanama with regard to recovery of the weapons, as per the objection recorded, was a joint Panchanama at the instance of three accused collectively and the discovery of the weapons was shown to be at the instance of all the three accused collectively. Therefore, the objection was raised that this Panchanama of discovery of the weapons is strictly not as contemplated under Section 27 of the Evidence Act.

33. PW15, Ramdas Kavne Sidhu, was a Panch witness in whose presence the pieces of some bullets, which were taken out from the body of PW10 Kathod by Dr. Sapatnekar, were sealed. But, as noted, this article was missing from the record and, therefore, no conviction can be made on the evidence of this witness.

34. PW16, Hafizgulam Nabi Shaikh, the PSI of Thane Town Police Station recorded the FIR of PW1 Ramdas Shirole.

35. PW17, Ramchandra Baburao Gavade, is an another PSI who assisted IO Marathe in the investigation. This IO arrested accused Nos.6 and on 7th March, 1991.

36. PW18, Jairam Madhu Chavandke, who was attached to Mumbra Police Station on 5th March, 1991, had received the message on wireless about the firing in question. This Police Officer had arrested accused No.11 on 6th March, 1991, and accused No.2 on 7th March, 1991, on suspicion.

37. PW19, Narayan Tukaram Kapse, who was attached to Mumbra Police Station, as per the instructions of PI Marathe, on 13th March, 1991, went to the Hospital of

Dr. Sapatnekar to record the statement of Kathod. However, Dr. Yadav gave Certificate (Exhibit-109) that he as not in a condition to speak. On 17th March, 1991, the Certificate of the same kind was issued (Exhibit-110).

38. PW20, Sadashiv Ravji Ghadge, who was the PSO of Mumbai Police Station, registered the crime No.179 of 1991 in question.

39. PW23 Madhukar Damodar Ajgekar, a Deputy Director of Ballastic Division, Forensic Science Laboratory, gave the report that the weapons examined by him were used for firing prior to the receipt of the same in the laboratory. He further opined that the cartridges found on the place of the offence and sustained by the deceased Atmaram and Vilas and might be fired through the arms which were discovered by the Police. Nothing positive to say that same firearms were used and bullets recovered were shot from the same firearms or weapons. The weapons discovered were not the same, but just similar, from which, the bullets found in the bodies could be fired. The discovery of the weapons was not fool proof. The circumstantial evidence misses various vital links to connect the accused with the offence and firearms.

40. Vishwanath Atmaram Bhongale, the defence witness was unable to bring the list of the documents seized by him from the hospital of Dr. Sapatnekar. Therefore, he could not speak about the description of the documents. He further admitted that when the raid took place, there were other Officers who were concerned with the said raid in the hospital of Dr. Sapatnekar. Therefore, the learned Special Public Prosecutor contended that this witness is unreliable and not supported defence case. After considering the whole background, we are of the view that the prosecution should have proved this initial case supported by the documents. The prosecution should have brought on the record, that the record of Dr. Sapatnekar's Hospital was sufficient to justify their case and the evidence of Dr. Sapatnekar. We find that for want of the record of the Hospital of Dr. Sapatnekar, the prosecution has failed to bring material on the record to justify the testimony of Dr. Sapatnekar in their support.

41. Another material evidence, which was used by the prosecution is the Report of the Ballastic Expert (Exh.124). It is settled that an expert's opinion and his evidence also needs corroboration and supporting evidence and it cannot be said to be conclusive proof. The learned Sessions Judge, in paragraph 36 of his

judgment, has exhaustively dealt with the Ballastic Report in question. We have gone through the same with the assistance of the Advocates. The learned Special Public Prosecutor made detail submissions relying on the results of the analysis of the Ballastic Expert's opinion. The basic submission was that this Ballastic Report is one of the material evidence to link the accused with the crime. However, we have noted that in the present case, there is no reference made by the Ballastic Expert as to by which arm or weapon, the injuries were caused by the particular bullets or pellets, which were found in the bodies of the deceased or the injured. There are no such details explained or given by the expert. The learned Special Public Prosecutor also was unable to connect the weapons with the bullets or pellets which were recovered from the bodies of the deceased. From this expert opinion, it is difficult to come to a conclusion that the weapons which were recovered from the house of PW4 were the same weapons which were actually used and bullets or pellets found in the body of the deceased were fired from the same weapons.

42. The opinion says that when the respective weapons were re-assembled, they form a complete single barrel and was in working condition and, therefore,

tested, if used for firing prior to its receipt in the laboratory. The cartridges recovered at the instance of accused No.3 were successfully test-fired from the shotgun recovered at the instance of the accused No.2. The cartridges found in the tempo were also tested and fired from the gun recovered at the instance of the accused No.1. The revolvers were used prior to their receipt in the laboratory. It is also opined that the hand-gun was used for firing prior to its receipt in the laboratory. Therefore, the basic submission is that the discovery of the weapons, read with the expert's opinion, supports the prosecution case that by these weapons, the accused committed the crime. However, we have noticed that there is nothing on the record to support the prosecution case as to which of the accused was in possession of which particular arm or weapon. It is also not clear as to by which weapon, the fatal injury caused to the deceased. Even if there are weapons discovered, still in absence of any positive evidence that this particular weapon was in the hand of a particular accused, it is difficult to accept the prosecution case that all the accused have committed the crime in question. In the present case, we cannot overlook that the discovery of the weapons itself was doubtful. The discovery of the weapons in question was not at the instance of all the accused. As per the

prosecution, it was discovered at the instance of accused Nos.1 to 3. However, the discovery panchanama itself is in dispute, it raises various doubts to the said discovery itself. Therefore, such discovery of instruments, if not proved beyond reasonable doubt. The supporting evidence of the panchas and experts itself is not sufficient to hold the accused guilty for the alleged offence, specially when the evidence of Kathod, alleged eye witnesses itself was unsupportive and unreliable.

43. At this stage, it is necessary to consider the principle of taking into consideration the report of the Ballastic Expert [Parekh, Edition 91 and other books]. There is nothing on the record to show as to where the fire tests were done and in whose presence. There is nothing on the record to suggest that test firing was done at a particular place and at a particular time. The weapons, even if discovered, still it is necessary for the prosecution to link the weapons, firstly of bullets or pellets found from the body and then it is also necessary to connect the accused with those weapons. Merely because from a particular revolver or rifle, particular types of cartridges or bullets could be shot and some of the empty, as well as, unused cartridges were recovered, that by itself is not

sufficient to connect the appellant with the crime in question. In the present case, admittedly, such recovery of weapons and cartridges were from the house of PW4, who turned hostile. There were various other weapons found or recovered from the spot which were not used or were not connected with the crime in question. The evidence of the expert (PW23) was not clear about the exact date, time and the weapons which were used for firing in question. His evidence was based on some of the weapons which were sent to him and tested by him and based on which he opined that the firing could be made by the particular weapon. Basically, it means that as per the expert's opinion, those used or unused cartridges could be used and/or fired from these weapons. The prosecution must prove beyond doubt that the bullets or any such other material recovered from the body of the deceased was shot from the particular gun or gunshot or revolver. The used or unused bullets or cartridges in question, unless connected with the weapons in question, with clinching evidence and material, the prosecution case based on such unconnected material also raises various doubts. It cannot be said that the prosecution has proved, beyond reasonable doubt, in the facts and circumstances of the present case, that all these weapons were actually used by the accused and had caused the death and injuries in

question.

44. The authorities cited by the Special Public Prosecutor, are settled principles of law. However, those judgments are distinguishable on facts. We have already noted that in the present case, the prosecution failed to bring material evidence on the record by not examining the independent, as well as, relevant labourers and witnesses who were present on the spot at the relevant time. The prosecution has also not examined the other relevant witnesses who could have linked the circumstances to link the accused with the crime. We find that there are various breaking links in between for want of clinching evidence to connect the crime. In this background, we are of the view that the principle of Section 114, Ill.(g) of the Evidence Act, as laid down in Srichand (supra) is not helpful to the prosecution. The discrepancies in the present matter of all material witnesses and specially PW1, PW2, PW10 and the Police Officers are quite serious in nature and after evaluation of the evidence in totality, based on the testimony of other witnesses we see that there is no case made out to interfere with the findings given by the learned Sessions Judge. Therefore, the case cited i.e. Public Prosecutor Bhagwanbhai (supra) also, in the facts and circumstances of this case, does not support

the prosecution case as sought to be contended by the learned Special Public Prosecutor. The testimony of the injured witness PW10, in the facts and circumstances of the present case, raises various doubts because of delay in making the statement and naming the accused after 12 days from the date of the incident even though PW10 Kathod was conscious during this time as per the evidence of Dr. Dhone, Dr. Sapatnekar and the Investigating Officer. The testimony of this injured witness raises various doubts, specially because there is no support from other alleged eye witnesses i.e. PW1 and PW2. In this background, we are not discarding and not considering the testimony of this witness merely because he was an injured witness and/or interested witness but because of the discrepancies and contradictions which go to the root of the matter. Therefore, the reasoning given by the learned Sessions Judge, acquitting the accused by disbelieving the testimony of this witness, needs no interference. The case cited by the Special Public Prosecutor Shyam (supra) is also, therefore, not supporting the prosecution case.

45. It is difficult to accept the submission that conspiracy against the accused was proved by the witnesses. The non-examination of independent witnesses

and basic witnesses by the prosecution definitely dislinked the circumstance to connect the accused with the crime. The various flaws and lacunas in the investigation, including no identification parade, also affects the prosecution case. The mere recovery of the tempo and the weapons and/or identification of the colour of the clothes of the accused itself cannot be the foundation of conviction. There is no material to prove the motive of all the accused to kill the deceased and Kathod as sought to be contended. The delay in recording the statement of PW10 was vital. Such delayed statement cannot be taken note of without proper corroboration and connecting circumstance. There is ample evidence on the record that Kathod was conscious before 17th March, 1991. Even if there is some substance in the case of the prosecution, still, as observed by the learned Judge, the accused are entitled for benefit of doubt. Based on the material on the record, we are of the view that the view taken by the learned Sessions Judge, is a plausible view. There is no perversity or illegality found in the judgment and order. Therefore, the submission raised by the Special Public Prosecutor is not accepted.

46. For the reasons stated above, there is no substance in the Appeal. The Appeal is dismissed.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]

[srpasha@hc]